WONG HO ENTERPRISE SDN BHD & ORS

v.

TIONG HOO TECK

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: S-02-164-2006]
27 FEBRUARY 2008

CIVIL PROCEDURE: *Injunction - Mareva injunction - Setting aside, application for - Principles - Grounds of good arguable case and real risk of dissipation by first defendant of its assets - Whether proved - Whether requirements for a Mareva injunction satisfied - Whether trial judge committed an error of law and misconceived facts before him*

This was an application to set aside the High Court order where a Mareva injunction was granted against the defendants (appellants herein) from disposing of the first defendant's assets or monies until the trial of this action. The plaintiff, a sole proprietor sub-contractor filed a claim against the first defendant company and its two directors ie the second and third defendants for a sum of RM357,894.10 for works done under a sub-contract. The issue raised by the defendants was that the final account and final payment certificate for the works had not been accepted by the Ministry of Education ('MOE') and that the management consultant for the project were still in the process of compiling and calculating the final account sum for the approval of MOE. The High Court judge, however, found that the conditions laid down in the agreement entitling the plaintiff to immediate payment of the balance sum had been satisfied and that it did not matter that the account had not been finalized by the MOE.

Held (allowing the appeal with costs)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) The defendants had good defence: that payment could not be due when the approved final sum had yet to be determined by the MOE. The defendants should not at this juncture be so harshly treated with a Mareva injunction slapped on them. The learned judge was wrong in not considering the payment

A certificate had not been approved by the MOE. The plaintiff's claim herein was premature and caused uncertainty to the very cause of action mounted by the plaintiff.

(2) The plaintiff did not show that it had a good arguable case B and there was no evidence pointing to a real risk of dissipation by the first defendant of its assets. Thus, the plaintiff had not satisfied the two requirements needed to succeed in obtaining a Mareva injunction. Further, the learned judge had fallen into error in lifting the corporate veil of the first defendant in C making his finding that the second and third defendants had schemed to delay payment.

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan untuk mengenepikan perintah Mahkamah D Tinggi kerana memerintahkan injunksi Mareva terhadap defendan-defendan (perayu-perayu di sini) sekaligus menghalang mereka dari melupuskan wang atau aset-aset defendan pertama sehingga perbicaraan kes ini selesai. Plaintif, sebuah firma sub-kontraktor milik tunggal, telah memfail tuntutan terhadap syarikat defendan E pertama dan dua orang pengarahnya, iaitu defendan-defendan kedua dan ketiga, untuk jumlah RM375,894.10 bagi kerja-kerja yang dilaksanakan di bawah satu sub-kontrak. Isu yang dibangkitkan oleh defendan-defendan adalah bahawa sijil akaun terakhir dan bayaran terakhir bagi kerja-kerja masih belum diterima F oleh Kementerian Pendidikan ('MOE'), dan bahawa konsultan yang mengurus projek masih lagi dalam proses mengumpul dan mengira jumlah akaun muktamad untuk kelulusan MOE. Hakim Mahkamah Tinggi, bagaimanapun, mendapati bahawa syarat-syarat seperti yang tertera di dalam perjanjian yang melayakkan plaintif untuk G mendapat jumlah baki bayaran dengan segera telah pun dipenuhi dan bahawa soal MOE masih belum memuktamadkan akaun adalah tidak penting.

Diputuskan (membenarkan rayuan dengan kos)
H **Oleh Abdull Hamid Embong JCA menyampaikan penghakiman mahkamah:**

(1) Defendan-defendan mempunyai pembelaan yang kukuh: iaitu bahawa pembayaran tidak menjadi terbayar selagi jumlah terakhir yang diluluskan belum ditentukan oleh MOE. I Defendan-defendan, di peringkat ini, tidak seharusnya dilayan dengan begitu buruk dan dibebankan dengan injunksi Mareva. Yang arif hakim silap kerana tidak menimbang bahawa sijil

bayaran belum lagi diluluskan oleh MOE. Tuntutan plaintif di sini adalah pramasa dan telah membangkitkan ketidakpastian terhadap kausa tindakan plaintif.

(2) Plaintif gagal membuktikan bahawa ia mempunyai satu kes yang kuat dan boleh dipertahankan selain tiada keterangan yang menunjuk kepada suatu risiko sebenar pelupusan aset oleh defendan pertama. Dengan kata lain, plaintif gagal membuktikan kedua-dua syarat yang diperlukan untuk berjaya dalam permohonan injunksi Mareva. Selain itu, yang arif hakim juga khilaf kerana mengangkat dinding korporat defendan pertama dan merumuskan bahawa defendan-defendan kedua dan ketiga telah merancang untuk melengah-lengahkan pembayaran.

Case(s) refferred to:

Biasamas Sdn Bhd v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

S & F International Ltd v. Trans-con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

For the appellants/defendants - Ronny Cham; M/s Ronny Cham & Co
For the respondent/plaintiff - Ting Sing Chuan; M/s Ting Anuar & Co

[Appeal from High Court, Kota Kinabalu; Suit No: K22-02-2006]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong JCA:

[1] This was an application to set aside the High Court order dated 25 January 2006 where a Mareva injunction was granted against the defendants (appellants here) from disposing of the first defendant's assets or monies the particulars of which are as stated in the order (pp 219-221 of appeal record) until the trial of this action.

[2] The plaintiff, a sole proprietor sub-contractor filed a claim against the first defendant company and its two directors ie, the second and third defendants for a sum of RM357,894.10 for works done under a sub-contract.

[3] The first defendant, a sub-contractor, had been given a Ministry of Education contract to build 14 units of teachers quarters in Tamparuli. The main contractor was one Sabatarget Sdn. Bhd.

[4] The plaintiff in undertaking the sub-contract works had apparently accepted and acted on the second defendant's oral representation to pass over the sub-contract works to the plaintiff.

[5] It was not in dispute that the plaintiff had completed the works. The first defendant had paid the plaintiff all contract sums due except for this final payment, now the disputed subject of this suit.

[6] The issue raised by the defendants was that the final account and final payment certificate for the works had not been accepted by the Ministry of Education (MOE) and that the management consultants for the project are still in the process of compiling and calculating the final account sum for the approval of MOE.

[7] The defendants had on numerous occasions informed the plaintiff that the MOE had not finalised the final account. As such any claim by the plaintiff is premature.

[8] Since the above assertions by the defendants were not challenged by the plaintiff they would be deemed accepted as undisputed facts.

[9] The defendants admitted that of the total contract sum for work done valued at RM2,338,374.85 which is certified by the management consultant, only a balance of RM229,556 is due and payable to the plaintiff. The defendants disputed the sum now claimed by the plaintiff.

[10] The learned High Court judge had found that the conditions laid down in the agreement entitling the plaintiff to immediate payment of the balance sum had been satisfied and that it did not matter that the account had not been finalised by the MOE. We feel that the learned judge is wrong in not considering the payment certificate had not been approved by the MOE.

[11] We are of the view that pending the final account being finalised and approved by the MOE, the plaintiff's claim is premature and this caused uncertainty to the very cause of action mounted by the plaintiff. On this ground alone we are of the view that the learned judge is wrong in granting the injunction.

[12] The Supreme Court in *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 had held that one of the requirements to be satisfied before a Mareva injunction is granted is that the plaintiff must show that it has a good arguable case. This we feel is lacking in the plaintiff's case for the reason stated above, ie, that the final sum to be paid by the first defendant has not been determined.

[13] The next requirement is for the plaintiff to show that there was a real risk of the dissipation of assets before judgment by the defendants. It was held by this court in *Biasamas Sdn Bhd v. Kan Yan Heng* [1998] 4 CLJ 754, there must be "solid evidence to establish the risk", in order to meet this requirement.

[14] On this issue of dissipation, the learned judge said:

> as for the risk of dissipation, the very manner in which the Plaintiff had disbursed its fund through a partnership with the 2nd & 3rd Defendants as partners and who disbursed the funds through the partnership account are indicative of the machination employed by the defendants to leave the 1st Defendant as a shell company.

[15] The defendants submitted that the learned judge was wrong in seemingly making a finding based on fraud when this was not pleaded by the plaintiff. The plaintiff had merely complained of the delay in paying up the final payment. However there was no evidence in the affidavit to support any allegation that by delaying payment, the second and third defendants could siphon off the asset of the first defendant. We therefore agree with the defendants' stand. We would also hold that the learned judge had fallen into error in lifting the corporate veil of the first defendant in making his finding that the second and third defendants had schemed to delay the payment.

[16] We could not from the facts find any evidence pointing to a real risk of dissipation by the first defendant of its assets. In fact the reverse is true in that the first defendant had all along fulfilled its obligations to make payments on the contract sum which were due and payable to the plaintiff.

[17] In our judgment, the defendants have a good defence: that payment could not be due when the approved final sum has yet to be determined by the MOE. The defendants should not at this juncture be so harshly treated with a Mareva injunction slapped on them.

[18] In allowing this appeal, we are wary of the principle that an appellate court should "defer to the judge's exercise of discretion and not interfere merely upon the ground that the members of the appellate court would have exercised that discretion differently." (see *S & F International Ltd v. Trans-con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC).

[19] However in the exercise of his discretionary power, we feel that the learned judge had arrived at his conclusion based on the wrong assumptions and inferences.

[20] We are of the view that the plaintiff had not satisfied the two requirements as mentioned above to succeed in obtaining a Mareva injunction.

[21] For these reasons, this appeal was allowed with costs here and below.